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In the Supreme Court
of the United States

OCTOBER TERM, 1958

No. 400

LEWIS C. DOUGALL,
Petitioner,

v.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The memorandum opinions of the Oregon district court on the first appeal are not reported, but are found in the transcript of record (No. 13492, pp. 16-17). The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 207 F.2d 843, and this Court's denial on February 1, 1954 of petitioner's application for a writ of certiorari is reported at 347 U.S. 904, 74 S. Ct. 429, 98 L. Ed. 1063.

The district court's order of January 15, 1957, denying petitioner's motion for relief under Rule 60 of the Federal Rules of Civil Procedure is found in the transcript of record (No. 15544, pp. 16-17). The opinion of the Court of Appeals, dated June 13, 1958, affirming this order and also denying petitioner's motion in that court for correction and amendment of the court's mandate on the previous appeal is reported at 256 F.2d 601. On August 5, 1958, the Court of Appeals denied petitioner's motion for a rehearing (No. 15544, p. 57).

QUESTION PRESENTED

Did the district court and the court of appeals err in denying petitioner's motion filed in November 1956 to set aside a final judgment entered in July 1952 upon findings of fact and conclusions of law, where the judgment had been affirmed by the court of appeals whose mandate did not authorize further proceedings?

STATEMENT OF THE CASE

The complaint herein was filed in the Oregon federal court on January 25, 1949. Therein petitioner sought to recover the sum of $200,000 general damages and $144,826.70 special damages on account of serious personal injuries he allegedly sustained while he was working on respondent's railroad right of way near Goodnough, Washington, on January 30, 1946. Liability was predicated upon various allegations of common-law negligence, as well as claimed violations of several provisions of the Federal Safety Appliance Acts (No. 15544, T.

3-7). The complaint stated that petitioner ". . . brings this action against the defendant under the Federal Employers' Liability Act and the Federal Safety Appliance Act" (No. 15544, Tr. 3). It was further alleged that at the time of injury "plaintiff was in the employ of Railway Company in interstate commerce" (No. 15544, Tr. 4).

While the action was commenced a few days prior to the expiration of the three-year statute of limitations contained in the Federal Employers' Liability Act, it was brought nearly a year after the expiration of the two-year Oregon statute (O.R.S. 12.110 (1)) governing an action for an injury to the person or rights of another, not arising on contract.

The record conclusively shows that at the time of pretrial in the spring of 1952 the late Mr. Elton Watkins, who was petitioner's attorney from 1947 until his death in 1956, made a deliberate tactical decision to stake his entire case upon the contention that petitioner was an employee of respondent and was therefore entitled to the protection of the Federal Employers' Liability Act, and not to rely upon any theory which petitioner might have had as a nonemployee of the respondent.

In a proposed pretrial order drafted by Mr. Watkins and served on counsel for respondent on April 17, 1952, (No. 15544, Tr. 29-43) one of petitioner's contentions under "Issues of Law" was that he would be entitled to recover ". . . whether plaintiff was an employee of defendant, or an employee of Morrison-Knudsen, Inc.,

or an invitee of defendant, or as a member of the public" (No. 15544, Tr. 39).

However, this ground of recovery was abandoned by Mr. Watkins in the final pretrial order which was agreed upon by counsel after a number of conferences prior to trial in May, 1952 (No. 13492, Tr. 3-13). It was therein provided that jurisdiction of the court was "claimed by plaintiff under and by virtue of the provisions of the Federal Employers' Liability Act, as amended" (Par. III). There were only two issues set up by the parties under "ISSUES OF FACT AND LAW." The first issue was entitled "I Alleged Liability Under Federal Employers' Liability Act." There were only two subdivisions under this issue: "(A) Right to Maintain Action Under Federal Employers' Liability Act" and "(B) Alleged Liability for Negligence Under Federal Employers' Liability Act and Alleged Violation of Safety Appliance Act." Under subdivision (B) the two issues were prefaced as follows: "1. If plaintiff has a right of action under the Federal Employers' Liability Act . . . " and "2. If plaintiff may maintain this action under the Federal Employers' Liability Act . . . " Under the second issue entitled "Damages" it was stated: "1. If plaintiff may maintain this action under the Federal Employers' Liability Act . . . " (No. 13492, Tr. 7-10). Pursuant to the written stipulation of the attorneys, the pretrial order superseded all pleadings (No. 13492, Tr. 13).

Issue I(A) relating to whether or not petitioner was an employee of respondent so as to be under the Federal Employers' Liability Act was segregated for separate

trial before the court on May 20, 1952, since petitioner had failed to file a timely demand for trial by jury. Following the trial, arguments and submission of briefs, the district court held that petitioner was not an employee of respondent but was employed by its contractor, Morrison-Knudsen, Inc. In its opinion the court stated (No. 13492, Tr. 16):

> "I should think that this proceeding might by amendment be converted into a third party proceeding—if plaintiff so desired—but of course both sides would be entitled to be heard as to this."

Petitioner's former counsel did not adopt the court's pointed suggestion to move for an amendment of the pretrial order and convert this action into a third-party proceeding on the theory that petitioner was an employee of Morrison-Knudsen, Inc., rather than of respondent. Instead he filed a motion for rehearing. On June 9, 1952, the record was reopened and petitioner was allowed to introduce additional testimony. The court thereafter, filed its memorandum on the petition for rehearing, determining adversely to petitioner the two controverted issues set up in the pretrial order under Issue I(A) (No. 13492, Tr. 17).

On July 11, 1952, the court entered findings of fact and conclusions of law which in substance determined that at the time of the accident petitioner was an employee of Morrison-Knudsen, Inc., and that he was not entitled to maintain the action under the Federal Employers' Liability Act (No. 13492, Tr. 17-24). Paragraph XVI of the findings of fact stated:

"The parties have stipulated and the Court finds

> that this action is brought solely under the provisions of the Federal Employers' Liability Act, and plaintiff's right to maintain this action is limited by and is to be determined solely in accordance with the provisions of the Federal Employers' Liability Act."

Prior to the date on which the findings and conclusions and the judgment of dismissal were entered, Mr. Watkins filed elaborate exceptions to the proposed findings of fact and conclusions of law. However, he did not object to proposed finding XVI (No. 13492, Tr. 25-27).

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit which affirmed the judgment of dismissal on the ground that the trial court's finding that petitioner was not an employee of respondent was "amply supported in the evidence" (207 F.2d 843, 847). The court further stated (ibid):

> "Appellant discusses in his brief the absolute duty imposed by the Safety Appliance Act and contends that the equipment which caused his injuries was used in violation of the provisions of that Act. The pre-trial order limits and ties his cause of action to the provisions of FELA. Incidentally, there was reserved the issue as to whether 'the active or permissive use of equipment in violation of the Safety Appliance Act' was an act of negligence. True the two statutes are in pari materia and a violation of the Safety Appliance Act is negligence. San Antonio etc Ry. Co. v. Wagner, 241 U.S. 476, 484. But an action brought under FELA is an action under federal law and is confined to the relationship of employer and employee. It follows that violation of the Safety Appliance Act is of no moment in determining Spokane's liability under FELA if 'employment' of appellant by Spokane is not shown. Another theory of action he might

have had as a non-employee may not be urged here since it was not advanced in the trial court. Fowler v. Crown-Zellerbach Corporation, 9 Cir. 163 F.2d 773, 774."

Petitioner then filed a petition for a writ of certiorari in this Court (October Term 1953, No. 508). The petition itself was twenty-nine pages in length and a reply brief of fourteen pages was also filed. It is of the utmost significance that in neither of these documents is any mention made of respondent's alleged liability to petitioner under the Federal Safety Appliance Act. The petition for a writ of certiorari was denied on February 1, 1954 (347 U.S. 904, 74 S. Ct. 429, 98 L. Ed. 1063), thus leaving unimpaired as the law of this case the ruling that petitioner was not respondent's employee so as to be under Federal Employers' Liability Act.

The mandate of the Court of Appeals which did not grant the trial court permission to take further proceedings in this case was entered in the district court on February 23, 1954 (No. 15544, Tr. 15-18).

It was not until November 21, 1956, nearly thirty-three months later, that petitioner filed his motion under Rule 60 of the Federal Rules of Civil Procedure for correction and relief from the judgment of July 11, 1952 (No. 15544, Tr. 18-22). Neither in the motion itself, nor in the record before the court, did petitioner offer any excuse or explanation for the long delay.

On January 15, 1957 the trial court denied petitioner's motion and a second appeal was taken to the Court of Appeals. Petitioner then filed in the Court of

Appeals a motion for correction and amendment of its mandate in the previous appeal. On June 13, 1958 the appellate court affirmed the order appealed from and also denied the motion for correction and amendment of its mandate. Finally, on August 5, 1958, the court below denied petitioner's motion for a rehearing.

Petitioner merely seeks a review by this Court of the district court's order denying his Rule 60 motion. No attempt has been made to bring before this Court the denial by the Court of Appeals of petitioner's motion for correction and amendment of its February 1954 mandate.

The entire record clearly demonstrates a deliberate and calculated choice upon the part of petitioner through his attorney, the late Mr. Watkins, in the spring of 1952, to stake his recovery entirely upon the proposition that he was employed by defendant and therefore entitled to the benefits of Federal Employers' Liability Act. Although he was given many opportunities thereafter to reassert another theory of recovery based upon the inconsistent theory that petitioner was an employee of Morrison-Knudsen, Inc., Mr. Watkins decided to concentrate on respondent's alleged liability to petitioner under the Federal Employers' Liability Act, and he battled his client's cause all the way to this Court.

The present proceedings under Rule 60 were initiated by petitioner's new counsel who believes that Mr. Watkins' tactical decision was ill-advised.

ARGUMENT

I. The district court lacked jurisdiction to grant petitioner relief under Rule 60 by way of correction or relief from a judgment which had been affirmed by the Court of Appeals in the absence of permission by that court.

The foregoing review of the record is probably unnecessary in view of the terms of the mandate of the Court of Appeals which was entered in the district court on February 23, 1954. Thereunder, the district court had no discretion to disturb the judgment of dismissal which had been affirmed. Furthermore, the Court of Appeals in June 1958 denied petitioner's motion for correction and amendment of its previous mandate. Since the Court of Appeals had not given the district court permission to deviate from its mandate, it follows that the district court below lacked the power to grant petitioner relief under Rule 60(b).

The leading case so holding is *Home Indemnity Co. v. O'Brien*, 112 F.2d 387 (C.A. 6). The O'Brien case was followed by the Court of Appeals for the Third Circuit in *Butcher & Sherrerd v. Welsh*, 206 F.2d 259, cert. den. 346 U.S. 925, 74 S. Ct. 312, 98 L. Ed. 418, rehearing den. 347 U.S. 924, 74 S. Ct. 513, 98 L. Ed. 1089, rehearing den. 347 U.S. 940, 74 S. Ct. 626, 98 L. Ed. 1089, rehearing den. 348 U.S. 939, 75 S. Ct. 354, 99 L. Ed. 736, where the court issued a writ of mandamus enjoining the district court from setting aside a judgment which had been affirmed. In that case, permission to apply for such relief had not been obtained from the appellate court and was not given by the mandate. The court rejected the argument that Rule 60(b) gave the district court

power to grant relief from such a judgment without the prior approval of the appellate court. The *Welsh* decision was followed by the same court in *Ginsburg v. Stern*, 242 F.2d 379.

II. Since the judgment of dismissal was entered in accordance with findings of fact and conclusions of law, the district court lacked jurisdiction to grant petitioner relief under Rule 60(a) on account of a clerical mistake, or an error arising from oversight or omission.

The record in this case clearly shows that there was no "clerical mistake" or "error or omission" in connection with the entry of the judgment of July 11, 1952. However, assuming only for purposes of argument that there was some mistake or inadvertence, the district court had no power to correct it under Rule 60(a). Of course, since Rule 60(a) carries no time limitation, and permission from the Court of Appeals to correct merely a clerical error probably would be unnecessary, the petition cites many cases decided under Rule 60(a) (Pet. p. 19). However, they all involve minor typographical or pure clerical errors or omissions, not of a substantive nature.

On the other hand, the various Courts of Appeal have uniformly held that where a judgment is entered in accordance with findings of fact and conclusions of law, as was the judgment of July 11, 1952, an omission or even a serious error therein, does not constitute an error which can be corrected under Rule 60(a) [*Gray v. Dukedom Bank*, 216 F.2d 109 (C.A. 6); *West Virginia Oil & Gas Co. v. George E. Breece Lbr. Co.*, 213 F.2d 702 (C.A. 5); *Ferraro v. Arthur M. Rosenberg Co.*,

156 F.2d 212 (C.A. 2); Cf. *Hirsch v. United States of America*, 186 F.2d 524 (C.A. 6)].

III. Since the motion for correction and relief from the July 1952 judgment was not filed until November 1956, the district court lacked jurisdiction of the motion, even if there had been a satisfactory showing of mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or some other misconduct.

Petitioner takes the alternative view (Pet. p. 20) that "this particular situation was either caused by a clerical error within the meaning of 60(a) or it was a mistake within the meaning of 60(b)(6)." We have shown that there was no clerical error in connection with the entry of the 1952 judgment. It is equally clear that the district court lacked jurisdiction to consider the motion under Rule 60(b)(6).

Even if it be assumed solely for purposes of argument that the record showed valid grounds for relief from the judgment on account of mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or misconduct of an adverse party, petitioner was barred from relief under Rule 60(b)(1) and (3) since a motion for relief on these grounds must be filed not more than one year after entry of judgment.

Rule 60(b)(6) can only be invoked under the most extraordinary circumstances, and for reasons other than would justify relief under any one of the first five subdivisions of Rule 60(b). Therefore, when a motion purportedly made under Rule 60(b)(6) is, in substance, founded upon grounds included in subdivisions (1), (2) or (3) of Rule 60(b), it is barred by the one-year

limitation applicable thereto. This rule has been followed by the Court of Appeals for the Ninth Circuit in *City and County of Honolulu v. United States of America*, 224 F.2d 573; and see 7 Moore's Federal Practice (2d Ed.), § 60.27, pp. 293-298.

IV. Even if grounds for relief under Rule 60(b)(6) had been shown, the motion was not made "within a reasonable time," in the absence of any explanation for the delay.

Petitioner's motion was filed over four years after the entry of judgment, and thirty-three months after the entry of the mandate of the Court of Appeals on the previous appeal. Petitioner has never offered any explanation whatsoever for this long delay. Therefore, assuming only for purposes of argument that petitioner could bring himself under Rule 60(b)(6), the motion was not made "within a reasonable time" and was correctly denied by the courts below on that ground alone.

In a number of cases, the courts of appeal have held that motions under Rule 60(b)(6) were not made "within a reasonable time" where periods of from fourteen to twenty-four months elapsed between the entry of judgment and the motion for relief under Rule 60(b). *Gilmore v. Hinman*, 191 F.2d 652 (C.A.D.C.) (sixteen months); *Cromelin v. Markwalter*, 181 F.2d 948 (C.A. 5) (fourteen months); *Bowles v. J. J. Schmitt*, 170 F.2d 617 (C.A. 2) (over two years); *Jurin v. Wiltshire Parkway, Inc.*, 238 F.2d 263 (C.A.D.C.) (sixteen months); *Morse-Starrett Products Co. v. Steccone*, 205 F.2d 244 (C.A. 9) (twenty-two months).

V. Rule 60(b) was not designed to relieve a party from a free and deliberate decision made by his attorney in the course of litigation.

Even if petitioner's motion for correction and relief were otherwise meritorious, had been timely made, and had been permitted under the mandate of the Court of Appeals, the record clearly shows that the late Mr. Elton Watkins, petitioner's former counsel, decided at pretrial to rely solely upon the Federal Employers' Liability Act. He made an election to abandon the inconsistent theory that petitioner, as an employee of Morrison-Knudsen, Inc. had a remedy against respondent under the third-party claim provisions of the Washington workmen's compensation law. The latter claim, which was set up in the first draft of pretrial order (No. 15544, Tr. 39), was eliminated from the final pretrial order, which was limited to petitioner's cause of action under the Federal Employers' Liability Act. Under both Rule 16 governing pretrials and Rule 60(b), the pretrial order was and is binding upon petitioner, since the primary objective of pretrial procedure is to limit the issues to be tried, and to define exactly the theories of recovery and defense. (*Fowler v. Crown Zellerbach Corp.*, 163 F.2d 773 (C.A. 9), and see discussion by Judge Fee in *Clark v. United States*, 13 F.R.D. 342, 345 (D.C. Or.).) As Judge Fee stated in *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 17 F.R.D. 52, 55 (D.C. Or.): "The pretrial order must after trial be binding upon all parties, as a judicial necessity." Similarly, it has been consistently held that theories not raised and presented in the pretrial order are waived (*Frank v. Giesy*, 117 F.2d 122, 126-127 (C.A. 9), and see 22 A.L.R.

(2d) 599, et seq., *Binding Effect of Court's Order Entered After Pretrial Conference.*")

At the risk of unduly lengthening this brief, some of the considerations which undoubtedly were in Mr. Watkins' mind at the time of pretrial and which influenced his decision to stake petitioner's case solely on the F.E.L.A. liability will be briefly reviewed. In the first place, the advantages of being under the F.E.L.A. were obvious: (1) assumption of risk would be no defense; (2) contributory negligence would not bar recovery but only diminish damages, and, if a violation of the Safety Appliance Acts contributed to the injury, then contributory negligence would not be a defense at all; (3) petitioner would have the benefit of the recent decisions of this Court interpreting the F.E.L.A.

However, it may not have been so much the advantages of F.E.L.A. coverage as the obstacles to recovery in a "third-party" action which prompted Mr. Watkins to rely exclusively on a claim under the F.E.L.A.

First of all, in a third-party action against respondent on the theory that petitioner was an employee of Morrison-Knudsen, Inc., contributory negligence and assumption of risk could have been asserted as complete defenses.

More important was the statute of limitations problem. This action had been filed just barely within the three-year limitation period of the F.E.L.A., but beyond the Oregon two-year statute governing an action for an injury to the person or rights of another, not arising on contract (ORS 12.110(1)).

However, there was another more serious obstacle to recovery on the theory that petitioner was employed by Morrison-Knudsen, Inc., at the time of the accident. It was admitted in the pretrial order (No. 13492, Tr. 6) that following the accident the Department of Labor and Industries of the State of Washington had paid to plaintiff, or for his account, a total of $8,690.71 in accordance with the payment schedules of the Washington Workmen's Compensation Act. Thus, any common-law cause of action against a third party which petitioner might have had was thereby assigned to the State of Washington pursuant to § 51.24.010, Revised Code of Washington (*Anderson v. Bauer*, 146 Wn. 594, 264 P. 410 (Sup. Ct. Wn.); *Arthur v. City of Seattle*, 137 Wn. 228, 242 P. 16 (Sup. Ct. Wn.); *State v. Starr*, 185 Wn. 18, 52 P.2d 897 (Sup. Ct. Wn.); *Kidder v. Marysville & A. Ry. Co.*, 160 Wn. 471, 300 P. 170 (Sup. Ct. Wn.)).

Thus, with the additional obstacles to recovery as a nonemployee of (1) common-law defenses, (2) the two-year Oregon statute of limitations, (3) assignment by operation of law of any cause of action to the State of Washington, it is easy to understand why Mr. Watkins decided to abandon the nonemployee theory and why he elected to concentrate solely upon the F.E.L.A. theory.

This litigation ended nearly four years ago when this court denied the previous petition for a writ of certiorari. Petitioner has shown no reason whatsoever why the finality of that judgment should be overthrown.

Thus, this case is analogous to *Ackermann v. United States*, 340 U.S. 193, 71 S. Ct. 209, 95 L. Ed. 207. There it was held that plaintiff could not invoke Rule 60(b)(6) to set aside a judgment canceling his certificate of naturalization where he could have filed a timely appeal from the judgment, but took the erroneous advice of a government official and decided not to appeal. Mr. Justice Minton wrote in part (340 U.S. at p. 198):

> "Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the Keilbar case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."

In any event, even if the district court had jurisdiction to consider petitioner's motion under Rule 60, the order appealed from was made in the exercise of the trial court's sound discretion. The Court of Appeals did not find any abuse of discretion. In fact, as that court recently noted in *Atchison, Topeka and Santa Fe Railway Co. v. Barrett*, 246 F.2d 846, 850, there is no case in the Ninth Circuit where a trial court's denial of a motion to set aside a judgment pursuant to Rule 60(b) has been reversed for an abuse of discretion. Judge Barnes there stated (p. 849):

> "Discretion is peculiarly and properly left in the trial court in matters of this kind."

CONCLUSION

We cannot conclude without commenting upon the improper attempt by petitioner's attorney to convey the false impression to the court that petitioner is without remedy and has only received "a small preliminary initial allowance" from the Department of Labor and Industries of the State of Washington, which he had been called upon to refund (Pet. pp. 22-23).

It was stipulated in the May 1952 pretrial order that payments of $8,690.70 had been made to petitioner and for payment of hospital and doctor bills (No. 13492, Tr. 6). There is, of course, nothing in the record to show what further payments have been made to petitioner in the intervening period of over six years.

The decision of the court of appeals on the previous appeal, and the denial by this Court of the petition for certiorari, determined once and for all that petitioner was an employee of Morrison-Knudsen, Inc., rather than an employee of respondent. The record shows that the Department of Labor and Industries had taken the position that if petitioner could prove he was respondent's employee and if he made a recovery on that theory, then he would have to refund the benefits he had received under workmen's compensation (No. 13492, Tr. 89). Quite naturally, the State of Washington backed up this position as amicus curiae in a brief and oral argument before the Court of Appeals. However, its contention was rejected (207 F.2d 843), and ever since the denial of the previous petition for certiorari, the State

of Washington has not even had a colorable claim against petitioner to recover back compensation payments. In fact, since that date petitioner has been certain of collecting whatever additional compensation benefits were allowable under the Washington statutes.

Finally, we wish to refute the repeated assertions in the petition that this was a case of absolute liability under the Safety Appliance Acts.

While the equipment in question which respondent permitted to be operated on its lines by Morrison-Knudsen, Inc., may have been in violation of several provisions of the Safety Appliance Act, still there were many other issues to be tried in a third-party suit brought by petitioner under the Washington Workmen's Compensation Act. These included the factual issues of proximate cause, contributory negligence and assumption of risk, and the legal defenses of the statute of limitations, and assignment of petitioner's third-party claim to the State of Washington by operation of law.

Respondent's case on these factual issues of proximate cause, contributory negligence and assumption of risk would depend upon the testimony of a group of petitioner's fellow workers who were at the scene of the accident on January 30, 1946. The witnesses were employed by Morrison-Knudsen, Inc., and were not under respondent's control. The difficulties which respondent would now encounter in attempting to obtain their testimony is obvious. For petitioner's counsel to argue that respondent " * * * would suffer no conceivable prejudice because the matter has not be-

presented at an earlier date" (Pet. p. 18) is most unrealistic, to say the least.

In essence, petitioner's position is that he has a new attorney who believes that the prior litigation should have been conducted differently, and wants this Court to set aside a binding pretrial order made over six years ago. Both the trial court and the Court of Appeals have held his belated application for relief to be lacking in merit.

There is no substantial question presented as to the proper interpretation of Rule 60 of the Federal Rules of Civil Procedure. Nor is there any conflict between the decisions of the lower courts and decisions of this Court or other courts of appeal.

The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

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